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No. 99-29

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In the
Supreme Court of the United States

OCTOBER TERM, 1990

**JAMES C. PLEDGER, COMMISSIONER OF REVENUES;
PETITIONER**

v.

**DANIEL L. MEDLOCK, COMMUNITY
COMMUNICATIONS COMPANY AND THE
ARKANSAS CABLE TELEVISION
ASSOCIATION, INC., ON BEHALF OF THEMSELVES
AND ALL OTHER SIMILARLY SITUATED TAXPAYERS
RESPONDENTS**

**CITY OF FAYETTEVILLE, ARKANSAS
INTERVENOR**

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS**

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QUESTION PRESENTED

Does the greater use of the public rights-of-way by cable television in the delivery of its service, as compared to such use by other businesses involved in the print and electronic segments of the mass communications media, provide a compelling governmental interest that will justify the discriminatory imposition of otherwise general Sales Taxes upon the charges made for cable television services, but not upon the charges made for the delivery of products or services by these other businesses engaged in the mass communications media?

**PARTIES TO THE PROCEEDING
AND RULE 29.1 STATEMENT**

Petitioner James C. Pledger is the former Commissioner of Revenues of the Revenue Division of the Arkansas Department of Finance and Administration and the person who is charged by statute with administering the state and local Sales Taxes imposed in Arkansas.¹

Respondents here are cable television operators and subscribers who are representatives of a certified class of taxpayers that are subjected to the state and local Sales Taxes imposed by Act 188 of 1987, as amended by Act 769 of 1989, and include the following named Plaintiffs:

Respondent Daniel L. Medlock is an individual, a subscriber to cable television services, and a resident of Little Rock, Pulaski County, Arkansas.

Respondent Community Communications Company is an independent corporation that has no subsidiaries or affiliates, and which operates six cable television franchises in south and southeast Arkansas.

¹In his Petition, Commissioner Pledger has characterized the State Treasurer and the other officials of local governmental entities wherein a local option Sales Tax is imposed in Arkansas as Respondents in this action, though these individuals were originally sued in the trial court in their representative capacities. These defendants were:

Jimmie Lou Fisher is the Treasurer of the State of Arkansas and the person who is charged with disbursing the challenged Sales Tax funds to state agencies and to county and municipal governmental entities.

Respondents Donald Venhaus and Patricia Tedford are, or were, the County Judge and Treasurer, respectively, of Pulaski County, Arkansas, a county wherein a countywide local Sales Tax is imposed.

Respondent Joann Boone is the Treasurer of the City of Benton, Arkansas, a municipality wherein a local municipal Sales Tax is imposed.

Respondent City of Fayetteville, Arkansas, an intervenor, is a municipal corporation wherein a local municipal Sales Tax is imposed.

Respondent Arkansas Cable Television Association, Inc. (ACTA) is an independent not-for-profit corporation that has no subsidiaries or affiliates, and is a trade organization composed of the operators of approximately 80 cable television systems in Arkansas.

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RESPONDENTS

CITY OF FAYETTEVILLE, ARKANSAS
INTERVENOR

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS**

Daniel L. Medlock, et al., respectfully request this Court to deny the Petition for Writ of Certiorari filed by the Commissioner of Revenues which seeks a review of the portion of the decision by the Supreme Court of Arkansas in this case that covers the state and local Sales Taxes charged for the period from July 1, 1987, through June 30, 1989. This portion of that decision held that these state and local Sales Taxes were unconstitutionally imposed, in light of the Respondents' First Amendment based challenge. The opinion of the Arkansas Supreme Court is reported at 301 Ark. 483, 785 S.W.2d 202.

STATEMENT OF THE CASE

The Respondents have filed their own separate Petition for Writ of Certiorari to the Supreme Court of Arkansas, which Petition has been docketed in this Court as No. 90-38. The Respondents' separate Petition for Writ of Certiorari covers the portion of the Arkansas Supreme Court's decision that upheld the constitutionality of these challenged state and local Sales Taxes that have been imposed in Arkansas upon charges for cable television services for all taxable periods after July 1, 1989. The Arkansas Supreme Court has held that the 1989 amendment to Ark. Code Ann. § 26-52-301(3)(D), by Act 769 of 1989, cured the prior unconstitutionality that that Court found existed (in light of the Respondents' First Amendment based challenge) for the period from July 1, 1987, through June 30, 1989. This determination was reached by the state supreme court even though there was no evidentiary record before that appellate court upon which to base such a finding, since the questioned Sales Tax statute was amended while this case was on appeal to the Arkansas Supreme Court from the Pulaski County Chancery Court.

The statement of the case set forth in the Respondent's separate Petition for Writ of Certiorari is more detailed than that set forth by Petitioner Pledger in this proceeding (Docket No. 90-29). However, rather than simply republishing such statement of the case in this brief, the Respondents here simply adopt by reference their statement of the case, as set forth in their own separate Petition for Writ of Certiorari in Docket No. 90-38.

SUMMARY OF THE ARGUMENT

The portion of the decision of the Supreme Court of Arkansas which held the challenged state and local Sales Taxes unconstitutional, for the period from July 1, 1987, through June 30, 1989, is not in conflict with the decisions of the highest appellate courts of any of Arkansas' sister states that have considered First Amendment based challenges to state and local Sales Taxes that are discriminatorily imposed upon businesses engaged in either the *print* or *electronic* segments of the mass communications media. Also, this portion of the Arkansas Supreme Court's decision is not in conflict with the cited decisions of the various federal courts of appeal that have interpreted cable television's First Amendment rights.

REASONS FOR DENYING THE PETITION

The "Solomon-like" decision rendered by the Arkansas Supreme Court in this case, i.e. splitting the question of the constitutionality of the challenged state and local Sales Taxes for periods before and after the 1989 amendment to Ark. Code Ann. § 26-52-301(3)(D) by Act 769 of 1989, has left all parties to this proceeding dissatisfied. The Commissioner of Revenues of the State of Arkansas, on behalf of the State of Arkansas, has filed this Petition for Certiorari (Docket No. 90-29) seeking a review of that portion of this decision which held the state and local Sales Taxes imposed upon charges for cable television services were unconstitutional for periods from July 1, 1987, through June 30, 1989, in the face of the Respondents' First Amendment based challenge. Similarly, the Respondents here have filed their own separate Petition for Certiorari (Docket No. 90-38) seeking to have this Court review the portion of the Arkansas Supreme Court's decision which has held that these state and local Sales Taxes are not imposed upon charges for cable television services in an unconstitutionally discriminatory manner for periods after July 1, 1989, the effective date of Act 769 of 1989's amendment to Ark. Code Ann. § 26-52-301(3)(D).

The Respondents herein submit that this Court should deny the Petition for Certiorari filed by the Commissioner of Revenues for the State of Arkansas in Docket No. 90-29, because there is no conflict between that portion of the Arkansas Supreme Court's decision and the decisions of the highest appellate courts of other states or the cited decisions of the federal courts of appeals. Likewise, the Respondents here, the Petitioners in Docket No. 90-38, submit that their separate Petition for Certiorari should be granted because the rationale of the portion of the decision of the Arkansas Supreme Court that upheld the constitutionality of the challenged state and local Sales Taxes for periods after July 1, 1989, does conflict (1) with the decisions of the highest appellate courts of some of

Arkansas' sister states on this same issue, and (2) with the rationale of certain federal appellate courts that have determined the extent of the First Amendment guaranteed rights of free press and free speech that can be claimed by cable television providers and subscribers.

I. THE PORTION OF THE DECISION OF THE ARKANSAS SUPREME COURT DECLARING THE STATE AND LOCAL SALES TAXES UNCONSTITUTIONAL IS IN CONFORMITY WITH THE DECISIONS OF THE HIGHEST APPELLATE COURTS OF ARKANSAS' SISTER STATES IN SIMILAR CASES.

The portion of the Arkansas Supreme Court's decision in this case that held that the imposition of the challenged state and local Sales Taxes imposed upon charges made for the sale of cable television services was unconstitutional, in light of the Respondents' First Amendment based challenge, is correct and should not be overturned. This portion of the state supreme court's decision properly applied the rationale dictated by this Court's decisions in both *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983) and *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 421 (1987).

Even though the Arkansas Supreme Court deliberately chose to *narrowly* apply such rationale in this case, by holding that the "scrambled" satellite television broadcast services were the only businesses involved in the mass communications media that were similarly situated to businesses providing cable television services, the appellate court below properly found that Arkansas' statutory scheme for imposing Sales Taxes unconstitutionally discriminated between similarly situated businesses that were entitled to claim the First Amendment's guaranteed rights of free press and free speech. Thus, the rationale of this Court's prior decisions in *Minneapolis Star* and

Arkansas Writer's Project that was applied by the Arkansas Supreme Court to the challenged Arkansas Sales Tax statute (as the statute existed for the two (2) year period in 1987 to 1989) is the same as that adopted and applied by the decisions of the appellate courts of the States of Oklahoma,² New York,³ Tennessee,⁴ Louisiana,⁵ California,⁶ and Illinois.⁷ Therefore, the Respondents submit that no conflict exists among the highest appellate courts of the various states on this First Amendment question, for the portion of the Arkansas Supreme Court's decision that held that the challenged state and local Sales Taxes were unconstitutional.

Petitioner Pledger argues that the portion of the Arkansas Supreme Court's decision declaring the state and local Sales Taxes unconstitutional for the two year period before the 1989 amendment to the Sales Tax statute should be reviewed and reversed by this Court, because the Commissioner *alleges* that the Arkansas General Assembly was unaware of the existence of charges for "scrambled" satellite broadcast television services when it first imposed the state and local Sales Taxes upon charges for cable

²*Dow Jones & Co. v. Oklahoma Tax Commission*, 787 P.2d 843 (Okla., 1990) and *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 P.2d 1312 (Okla., 1990).

³*McGraw-Hill, Inc. v. State Tax Commission*, 541 N.Y.S.2d 252 (App. Div. 3 Dept. 1989), *affirmed and adopted*, 252 N.E.2d 1963 (N.Y., 1990).

⁴*Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn., 1990) and *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251 (Tenn., 1990).

⁵*Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (La. App. 1st Div., 1987).

⁶*City of Alameda v. Premier Communications Network, Inc.*, 202 Cal. Rptr. 684 (Cal. App. 1 Dist., 1984), *cert. denied*, 469 U.S. 1073 (1984).

⁷*Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988).

television through the enactment of Act 188 of 1987. Therefore, Petitioner Pledger alleges that the Arkansas General Assembly did not *intend* to single out cable television for taxation (Pet. 10-12).

The Respondents submit that there is neither a factual nor a legal basis for this argument by Petitioner Pledger, and that the Supreme Court should reject this specious argument, out of hand. The Petitioner argues that the technology for "scrambled" satellite services was so new that it was unknown in 1987 when the Arkansas General Assembly adopted Act 188 of 1987. However, the evidentiary record in this case is *totally* devoid of any evidence offered by the Petitioners to establish such alleged fact.⁸ Besides the fact that home owned "dish antennas" have commonly been sold throughout the United States for 15 years or more, the testimony of the manager of Petitioner Pledger's own Sales and Use Tax Section (see Appendix, *infra*),⁹ totally refutes the Petitioner's argument. Mr. Price acknowledged in his testimony that he was aware of the constitutional challenge invoked by the Respondents in this case to the then recently enacted statute that imposed the state and local Sales Taxes upon charges for cable television service. He also testified in August of 1987 that there were no Arkansas state or local Sales Taxes imposed upon charges for "scrambled" satellite broadcast television services by Act 188 of 1987. Similarly, the Respondents' original Complaint filed in this action in May of 1987 specifically alleged that Arkansas' statutory scheme

⁸Petitioner Pledger offered very little testimony or documentary evidence in the trial court in support or defense of his position in this class action case. Instead, The Petitioner appears to have rested his defense in this case upon the mere evidentiary presumption of the constitutionality of legislative acts.

⁹This individual was called as a witness by the Respondents at an evidentiary hearing in August of 1987 on the Respondent's Motion for Preliminary Injunction to establish an escrow account in the Chancery Court. This hearing was held less than three (3) months after this constitutional class action challenge was instituted by the Respondents.

for imposing Sales Taxes violated their First Amendment rights of free speech and free press, because other segments of the mass communications media, and in particular charges made for "scrambled" satellite television broadcast services were not subjected to these same excise taxes. Thus, there is no factual basis in the evidentiary record established in this case that would support the Petitioners' argument in this regard.

Petitioner Pledger does not contest the finding of the Arkansas Supreme Court that there was an "actual" discrimination in the imposition of Arkansas' state and local Sales Taxes upon charges for cable television service, while these same excise taxes were not imposed upon charges for "scrambled" satellite services, during the two year period between July 1, 1987, and June 30, 1989. However, Commissioner Pledger seems to excuse such discriminatory action by the General Assembly because he alleges that the General Assembly did not "intend" to discriminate against cable television operators and subscribers, and because the Arkansas General Assembly supposedly acted in a reasonable manner to cure the discrimination by attempting to also impose these excise taxes upon the charges for "scrambled" satellite broadcast television services by adopting the 1989 amendment (Pet. 10-12).

The Respondents submit that the "intent" of the Arkansas General Assembly in adopting either Act 188 of 1987 or Act 769 of 1989 was immaterial; where the evidentiary record establishes that there was an actual discrimination in the imposition of these state and local Sales Taxes. That legal position was noted by this Court in Justice O'Connor's opinion in *Minneapolis Star, supra*, where it was stated (460 U.S. at 592-593):

We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua*

non of a violation of the First Amendment We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the state to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment, and the judgment below is reversed. (Citations omitted).

Petitioner Pledger argues (Pet. 10) that the Arkansas General Assembly acted to cure this discriminatory application of these Sales Taxes, by the amendment to Act 188 of 1987 through the adoption of Act 769 of 1989, at the next legislative session after the state became aware of the existence of such "scrambled" services. Not only is this mere allegation refuted by the August 1987 testimony of Petitioner Pledger's own manager of the Revenue Division's Sales and Use Tax Section (Appendix, *infra*), as cited above, but the Arkansas General Assembly met in four "special sessions" in 1987 and 1988,¹⁰ after the Complaint was filed in this class action suit to challenge the constitutionality of Act 188 of 1987, without there being any legislative action taken to amend Act 188 of 1987.

Thus, the Respondents submit that this Court should not grant Petitioner Pledger's Petition for Certiorari covering the portion of the Arkansas Supreme Court's decision that held the state and local Sales Taxes imposed upon charges for cable television service to be unconstitutional for the two (2) year period in issue, because that portion of the challenged decision was correctly decided by the Court below. There is no conflict between

¹⁰First Extraordinary Session (June 2-5, 1987); Second Extraordinary Session (October 6-9, 1987); Third Extraordinary Session (January 26-February 5, 1988); and Fourth Extraordinary Session (July 11-14, 1988).

this portion of the state supreme court's decision and similar decisions of appellate courts of Arkansas' sister states. Finally, there is no factual or legal basis for Petitioner Pledger's argument regarding the alleged "unintentional" discrimination that resulted from the Arkansas General Assembly's imposition of the state and local Sales Taxes upon charges for cable television service by the adoption of Act 188 of 1987.

II. THE GREATER USE OF THE PUBLIC RIGHTS-OF-WAY BY CABLE TELEVISION DOES NOT ESTABLISH A COMPELLING GOVERNMENTAL INTEREST THAT WOULD JUSTIFY A DISCRIMINATORY IMPOSITION OF THE STATE AND LOCAL SALES TAXES IN QUESTION.

Petitioner Pledger argues (Pet. 9-10) that the greater use of the public rights-of-way by cable television, as compared to other businesses involved in both the print and electronic segments of the mass communications media, is a "distinguishing feature of cable television [that] justifies the differing tax treatment under Act 188 of 1987." Petitioner Pledger relies upon the rationale of decisions of three federal appellate courts to support his argument in this regard. See, *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 714 (C.A.8, 1986); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (C.A.7, 1982); and *Community Communications, Inc. v. City of Boulder*, 660 F.2d 1370 (C.A.10, 1981). These three federal decisions concerned questions of cable access or a First Amendment based defense to an antitrust cause of action.

The Respondents submit that the restrictive First Amendment reasoning set out in these cited decisions is inapplicable to the question involving the discriminatory imposition of Arkansas' state and local Sales Taxes in this case. Therefore, the Respondents maintain that the Arkansas Supreme Court properly distinguished these cases by holding that (Pet. Appendix A, A-3):

There was uncontradicted testimony to the effect that a cable television enterprise pays a franchise fee for the use of the public right-of-way. It is true that the use of public rights-of-way by cable television may be subjected to more regulation as has been suggested in some cases However, those cases involve regulation related to access or use of rights-of-way rather than a tax which has no relationship to the acquisition of the privilege of using public property. We thus find the fact that cable television uses public property and must obtain a franchise to do so should not control the result in this case. (Citations Omitted)

Thus, the Respondents submit to this Court that there is no direct conflict in the portion of its decision in this case that held the challenged state and local Sales Taxes to be unconstitutional and the restrictive First Amendment rationale or analysis adopted by the federal courts of appeals of the Seventh, Eighth and Tenth Circuits in the factual circumstances presented in each of those cases cited above.¹¹ Those federal decisions concern cable access or antitrust laws and they do not even attempt to measure whether cable television was "similarly situated" to other businesses involved in the print or electronic segments of the mass communications media for purposes of taxation.

III. THOUGH PETITIONER PLEDGER'S PETITION FOR CERTIORARI SHOULD BE DENIED, THE RESPONDENTS' SEPARATE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Though the Respondents here submit that the portion of the Arkansas Supreme Court's decision that declared the statutory scheme for imposing Arkansas' state and local

¹¹For an excellent commentary on the First Amendment rights of cable television as discussed in numerous cases deciding issues involving access, regulation and taxation of cable television, see Ferris, Lloyd & Casey, *Cable Television Law*, Vol. 1, para. 13.07, Matthew Bender (1990).

Sales Taxes to be unconstitutional is correct, in light of the Respondents' First Amendment based challenge for periods from July 1, 1987, through June 30, 1989, and therefore should not be reviewed by this Court; these Respondents strenuously urge the members of this Court to grant their separate Petition for Writ of Certiorari to the Arkansas Supreme Court (Docket No. 90-38). The portion of the decision by the state supreme court below that upheld the constitutionality of Arkansas' statutory scheme of state and local Sales Taxes for periods after the effective date of the 1989 statutory amendment (1) conflicts with decisions of the highest appellate courts of Arkansas' sister states, and (2) prospectively approved the constitutionality of Arkansas' statutory scheme of excise taxes (as amended by Act 769 of 1989) without giving the challenging cable operators and subscribers even the opportunity to establish an evidentiary record, on remand, to support their allegations of the statutory scheme's continued unconstitutionality. The Respondents here should have at least been given the opportunity to prove their case, on remand, before the Arkansas Supreme Court ruled upon the constitutionality of the amended statutory scheme of state excise taxes imposed upon cable television services and "scrambled" satellite broadcast television subscription services.

The Arkansas General Assembly amended the challenged statute (Ark. Code Ann. § 26-52-301(3)(D)) after the trial court chancellor had entered his decision and while this case was on appeal to the Arkansas Supreme Court. Thus, as noted by the Arkansas Supreme Court in two places in its decision, in this case, Act 769 of 1989 was not passed upon by the Chancellor in the trial court when he reached his decision in this case.

Accordingly, Respondents submit that their separate Petition for Writ of Certiorari should be granted; that this Court should review that portion of the Arkansas Supreme Court's decision in this case and hold that the Arkansas court erred in its constitutional analysis. The Respondents

believe this Court should approve the constitutional analysis made by the highest courts of the States of Oklahoma and New York¹² in applying this Court's First Amendment analysis (as stated in its *Minneapolis Star* and *Arkansas Writer's Project* decisions) to similarly situated businesses involved in both the *print* and *electronic* segments of the mass communications media. These Respondents therefore submit that the post July 1, 1989 portion of this case be remanded to the Arkansas courts for further proceedings to establish the amount of state and local Sales Taxes imposed after that date which should be refunded to the taxpayer-members of the class of Petitioners who are represented by Daniel L. Medlock.

¹²See the cases cited at footnotes 2 and 3, *supra*.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari filed by Petitioner Pledger in Docket No. 90-29 should be denied, and the separate Petition for Certiorari filed by these Respondents in Docket No. 90-38 should be granted.

JULY 30, 1990

Respectfully submitted,

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APPENDIX

(Portion of the Abstract of the testimony of Gail Price, Manager, Sales and Use Tax Section, Revenue Division, Arkansas Department of Finance and Administration, given during the evidentiary hearing on the Appellants' Motion for a Preliminary Injunction to establish an escrow account on August 19, 1987.)

IN THE SUPREME COURT OF THE
STATE OF ARKANSAS

DANIEL L. MEDLOCK, ET. AL.	APPELLANTS
VS.	DOCKET NO. 89-89
JAMES C. PLEDGER, ET. AL.	APPELLEES
CITY OF FAYETTEVILLE, ARKANSAS	INTERVENORS

ABSTRACT AND BRIEF FOR APPELLANTS

Filed June 23, 1989

WITNESS: GAIL PRICE
(for Plaintiffs)

DIRECT EXAMINATION:
(Mr. Sayre)

My name is Gail Price and I am the manager of the State Sales and Use Tax Office for the Arkansas Department of Finance and Administration. Both the state and local Sales Taxes in question imposed by Act 188 of 1987

are collected under my supervision. (R. 749-50, Apps.' Abst. 71)

* * *

I answered the Plaintiffs' Interrogatories and Request for Admissions on behalf of the Revenue Division and it is my understanding this action is a constitutional challenge to question the validity of the state and local Sales Taxes imposed by Act 188 of 1987. (R. 751, Apps.' Abst. 72)

* * *

I have been in the courtroom and I heard the testimony about scrambled satellite television broadcasts (like HBO) provided for a fee to home dish antenna owners. Arkansas does not impose a Sales Tax upon the charge made for providing the Arkansas Radio Network or HBO programs to a satellite dish owner, like the one imposed on cable system service because of the provisions of act 188 of 1987.

Prior to the adoption of Act 188 of 1987, there was no Sales Tax imposed upon the providing of programming by cable television service. There is no Sales Tax upon the sale of newspapers in Arkansas, nor upon the sale of magazines published in the State of Arkansas that are sold by subscription. However, there is a Use Tax imposed upon out-of-state published magazines sold by subscription into Arkansas and a Sales Tax imposed upon the over the counter sales of magazines, whether they are published in Arkansas or not. (R. 753-754, Apps.' Abst. 73-74)

* * *

REDIRECT EXAMINATION:
(Mr. Sayre)

If a decoder is sold, there is a one time Sales Tax on it. Thereafter no Sales Tax is imposed upon providing HBO or ESPN service through that decoder from a satellite broadcast (R. 766-767, Apps.' Abst. 76-77)
